Filed 7/16/19 In re S.S. CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re S.S., a Person Coming Under the Juvenile Court Law.	
MENDOCINO COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff and Respondent, v. K.S., Defendant and Appellant.	A155543 (Mendocino County Super. Ct. No. SCUK-JVSQ-18-18724)

K.S. (Mother) appeals from the denial of her petitions under Welfare and Institutions Code section 388[1] to modify a dispositional order bypassing family reunification services with her daughter, S.S. Mother argues the juvenile court erred in summarily denying her petitions without a hearing because she made a prima facie showing of changed circumstances and that the proposed modification would be in the child's best interests. We disagree and affirm.

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

FACTUAL AND PROCEDURAL BACKGROUND

Mother's history with the child welfare system began when she herself was removed from her parents' custody at the age of eight due to her parents' drug use. In 2013, at age sixteen, Mother gave birth to her first child, A.G., and a dependency action was filed in 2016 alleging severe neglect, unsanitary housing conditions, and Mother's substance abuse with methamphetamine. Mother was ordered to family dependency drug court but failed to participate. In November 2016, Mother lost parental rights to A.G. due to her failure to reunify.

In December 2017, S.S. was born premature and tested positive for methamphetamines and cannabinoids. Mother also tested positive for these substances at the time of delivery, and she admitted using heroin up to two weeks prior to S.S.'s birth. After the delivery, Mother left the hospital against medical advice. S.S. was airlifted to the pediatric intensive care unit at UCSF Benioff Children's Hospital.

On January 4, 2018, the Mendocino County Health and Human Services Agency (Agency) filed a juvenile wardship petition for S.S. under section 300, subdivisions (a), (b), and (j), alleging she was at substantial risk of serious physical harm by her parents. The petition alleged that S.S. was born premature and tested positive for drugs, that her parents failed to provide adequate supervision due to mental illness and substance abuse, and that each parent had previously lost custody of an older child due to child welfare intervention.

Neither Mother nor S.S.'s father, C.K. (Father),[2] was present at the January 4, 2018, detention hearing. The juvenile court entered a temporary detention order and continued the hearing to the following day. At the continued hearing, Father was present but Mother was not, and the juvenile court affirmed its findings and the detention order. S.S. was placed in foster care with a paternal cousin in Fresno County.

In its January 2018 jurisdiction report, the Agency stated both parents had chronic substance abuse histories; current substance abuse problems with heroin,

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[2] C.K. is not a party to this appeal.

methamphetamine, and marijuana; and unstable living situations (both were homeless and living with friends and in motels). Father's history also included extensive drug-related criminal arrests and convictions.

The Agency further reported that during an in-person interview in December 2017, Mother told social workers she had untreated depression and anxiety. She agreed to submit to a drug test and showed positive for methamphetamine and cannabinoids. During a telephone interview in January 2018, Mother stated she did not like drug treatment programs and knew she would not be successful in them. The social worker scheduled an appointment to meet with Mother at the Agency to discuss visits, referrals, and court process, but Mother cancelled the appointment. The Agency provided both parents with referrals to Substance Use Disorder Treatment (SUDT) for assessment and treatment and to an intake support group.

Mother and Father had one visit with S.S. on March 8, 2018. During this visit, S.S. smiled, played with Mother's hair, and fell asleep in Mother's arms.

At the jurisdiction hearing on March 13, 2018, the juvenile court found by a preponderance of the evidence that the material allegations of the petition were true. That same day, Mother was arrested on a felony warrant and was incarcerated at the county jail.

In its April 2018 disposition report, the Agency reported that S.S. was comfortable and happy with her relative placement family, and that her caregivers were attentive to her needs and willing to adopt her. The Agency further reported that Mother had not participated in the intake support group or SUDT prior to her arrest, but she began attending SUDT in jail. The Agency recommended that the bypass provisions of section 361.5, subdivisions (b)(10) and (b)(13), be applied to both parents.[3] The

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[3] The law favors reunification where possible (*In re Aryanna C.* (2005) 132 Cal.App.4th 1234, 1242), but a juvenile court may bypass reunification services if one of seventeen circumstances is established by clear and convincing evidence (§ 361.5, subd. (b)). These circumstances include where the court has ordered termination of reunification services for any of the child's siblings or half siblings who were removed from the parent because of the parent's failure to reunify (§ 361.5, subd. (b)(10)), and

recommendation as to Mother was based on her prior failure to reunify with her child, A.G., and her failure to address her current substance abuse issues. The Agency also recommended against visitation, as the parents had not participated in the dependency case or played a role in S.S.'s life, had made themselves available for only one visit, and were still heavily into their drug addictions.

The disposition hearing was held on May 22, 2018. Mother testified she had made multiple efforts to see S.S. but found it difficult to visit because she had no car and lived far away. Mother could not recall receiving the SUDT referral from the social worker and explained that she did not engage in any substance abuse treatment prior to her incarceration because she "wasn't fully aware of everything." As to her history of substance abuse, Mother said her longest period of sobriety was eight months, and she had entered a sober living environment at age 19, but failed twice because she felt too much pressure. While in jail beginning in March 2018, Mother had been attending SUDT, the Workforce Innovation Opportunity Act (WIOA) program, parenting classes, education courses, and Narcotics Anonymous (NA) and Alcoholics Anonymous (AA) meetings, and had requested to see a mental health professional. Mother testified she was dedicated to a clean and sober life, and her goal was to continue with services after her release.

Mother also submitted several exhibits showing her participation in SUDT, WIOA, and various classes in jail. She also submitted an unsigned letter to the juvenile court dated May 7, 2018, in which she described her efforts to stay sober and engage in services while in custody and outlined her post-release plans.

On May 23, 2018, the juvenile court applied the bypass provisions of section 361.5, subdivision (b)(10) and (13), to Mother and Father, finding that visitation would be detrimental to S.S. With particular regard to Mother, the court found that her efforts

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where the parent has a history of extensive, abusive, and chronic use of drugs or alcohol and has resisted prior court-ordered treatment during a three-year period immediately prior to the filing of the petition that brought the child to the court's attention (*id.*, subd. (b)(13)).

in the last two months while incarcerated did not constitute reasonable efforts to overcome her substance abuse problem in order to reunify with S.S., and reunification was not in S.S.'s best interests.

Mother was released from jail in July 2018.

In September 2018, Mother filed a petition under section 388 to modify the order bypassing services. Specifically, the petition sought the return of S.S. to Mother's care and custody in the form of family maintenance services, or alternatively, case dismissal. Citing changed circumstances, the petition alleged that Mother had engaged in services including AA/NA and work programs while she was in custody, and that after her release, she continued to engage in services, became employed, and maintained a sober lifestyle. The proposed modification would be in S.S.'s best interests, the petition alleged, because Mother obtained adult life skills from her employment; a "biological bond" existed between her and S.S.; and Mother loved S.S. very much. Mother's attorney, Lindsay Peak, signed the petition, which attached both a letter and an updated progress report from the Mendocino County Sheriff's office listing the programs Mother participated in during incarceration. On September 10, 2018, the juvenile court denied the petition without a hearing, finding it did not state new evidence or changed circumstances.

At the September 13, 2018, permanent placement hearing, Peak requested a continuance so that Mother could file a new section 388 petition. According to Peak, Mother was still homeless and had no money for phone or internet services to communicate with counsel. Peak further stated that since the denial of the first section 388 petition, she learned that Mother had been attending AA/NA meetings, working at a youth resource center called the Arbor, maintaining a sober living, engaging with SUDT, and making efforts to be in contact for services. The juvenile court granted the continuance request.

On October 1, 2018, Peak filed a second section 388 petition that was nearly identical to the first. The main difference was that the second petition attached Peak's declaration stating that Mother had authorized her to share the following information:

Mother had documentation of her attendance at AA/NA meetings, but providing the documentation was impeded by her lack of a vehicle, her inability to access a storage shed, and her lack of an easily accessible telephone line. She had maintained a clean and sober lifestyle since her release from jail, and the drug tests she voluntarily took after her release were negative. Mother loved S.S. and had made efforts to see her. She also made multiple contacts with the Agency that were not documented.

Peak's declaration additionally recounted the following: Peak had received email confirmation from a social worker that Mother had engaged in unrecorded contacts with the Agency. Mother had been, but apparently was no longer, employed at the Arbor. Peak received an email from SUDT that an unnamed client of hers wished to release documents, but Peak had yet to receive the documents or learn the client's name. Mother had recently attempted to contact Peak, but Peak could not immediately return the call. Finally, Peak was unable to provide further documentation "due to a lack of medical releases and release of information on file."[4]

At the continued permanent placement hearing on October 2, 2018, Peak orally requested a continuance based on an unspecified medical condition of Mother's, as well as Mother's inability to obtain documents due to a financial issue with her storage unit. The juvenile court denied the request for lack of good cause. Mother then testified she spent time with newborn S.S. in the intensive care unit and also at the March 2018 visit, during which she read a book to S.S., and S.S. smiled, played with Mother's hair, and fell asleep in her arms. Mother said she felt "[d]evastated" when the visit ended.

The court denied the second section 388 petition because it was not signed by Mother and did not state new evidence or change of circumstances. The court adopted the Agency's recommendations on the issue of permanent placement, finding that reunification services had previously been denied or terminated and that no statutory exceptions to adoption applied. (See § 366.26, subd. (c)(1).) And while acknowledging

[4] The second petition also attached a copy of the same May 7, 2018, letter from Mother to the juvenile court that was submitted at the disposition hearing.

"a slight bond between the minor and mother," the court observed "there's almost always a bond, that's not the kind of bond we're talking about. There hasn't been visitation." Finally, the court found clear and convincing evidence that S.S. was adoptable. The court ordered termination of the parental rights of Mother and Father and adoption as the permanent plan for S.S.

DISCUSSION

Mother appeals from the denial of her request for a section 388 hearing based on changed circumstances. She also appeals from the denial of the request for a continuance due to her medical and financial issues.[5]

A party may petition the juvenile court to modify a prior order. (§ 388, subd. (a).) To prevail, the petitioner must show a "change of circumstance or new evidence" and that the proposed change would be in the child's best interests. (§ 388, subd. (a)(1)–(2); *In re J.C.* (2014) 226 Cal.App.4th 503, 525.) The decision to modify a previously made order rests within the court's discretion, and its determination may not be disturbed unless there has been a clear abuse of that discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

The juvenile court shall order a hearing on a section 388 petition where "it appears that the best interests of the child . . . may be promoted" by the new order. (§ 388, subd. (d).) But the petitioner must "make a prima facie showing to trigger the right to proceed by way of a full hearing." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.) "While the petition must be liberally construed in favor of its sufficiency [citations], the

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[5] Additionally, Mother appeals the findings and orders from the section 366.26 hearing terminating parental rights. Although Mother did not appeal from the May 23, 2018, disposition order bypassing reunification services, she makes several arguments attacking the disposition order. For instance, she cites Eighth Amendment cases relating to juvenile offender sentencing to contend the juvenile court should have considered her youth and developmental immaturity at the time of the first dependency case with A.G. before bypassing reunification services with S.S. We do not reach the merits of those arguments, as the unappealed disposition became a final and binding judgment and cannot be attacked on appeal from a later appealable order. (*In re Jesse W.* (2001) 93 Cal.App.4th 349, 355.)

allegations must nonetheless describe specifically how the petition will advance the child's best interests." (*In re G.B.* (2014) 227 Cal.App.4th 1147, 1157 (*G.B.*).) "[I]f the liberally construed allegations of the petition do not make a prima facie showing of changed circumstances and that the proposed change would promote the best interests of the child, the court need not order a hearing on the petition." (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) Moreover, section 388 requires that the petition be verified. (§ 388, subd. (a)(1); Cal. Rules of Court, rule 5.570(a).)

Here, neither of the section 388 petitions was verified by Mother, and the verifications by Peak were inadequate because she did not have personal knowledge of the facts alleged therein, including Mother's participation in services and programs in jail and after release, her continued sobriety, and her "biological bond" with S.S. Additionally, Peak did not set forth the reasons why the verifications were not made by Mother, as required when a party's attorney verifies a pleading on behalf of a party who is unable to do so. (See Code Civ. Proc., § 446, subd. (a).) Although the second petition attached the May 7, 2018 letter from Mother to the juvenile court, that letter was unsigned and its statements were not made under penalty of perjury under the laws of the State of California. (See *In re Ramone R.* (2005) 132 Cal.App.4th 1339, 1348 [petition did not establish prima facie showing because it was not verified by mother or accompanied by mother's sworn declaration supporting counsel's allegations].)

Even if we were to overlook this procedural defect, we would nevertheless agree with the juvenile court that Mother's petition afforded no basis for the requested relief. Liberally construed, the allegations of the petition showed that Mother had engaged in additional classes and treatment while in jail, that she was briefly employed after her release, that she continued to engage in unspecified services, and that she maintained approximately six to seven months of sobriety since her incarceration.

Notably, however, Mother's period of sobriety was relatively brief compared to her many years of drug abuse, and she had previously relapsed after being sober for as much as eight months. There was also no indication in the record that Mother had found suitable housing to care for a young child. Indeed, Peak told the court in September 2018

that Mother was still homeless at that time, and Peak's declaration supporting the second petition reported the death of the person who had offered Mother housing after her release from jail. Finally, Peak's statements suggesting the existence of additional forthcoming supportive documents were too vague and conclusory to demonstrate a prima facie case of new evidence or changed circumstances. (*In re Edward H.* (1996) 43 Cal.App.4th 584, 593 [specific allegations describing evidence of changed circumstances or new evidence required].)[6] On this record, the juvenile court did not err in concluding that the allegations, even if true, were insufficient to show a prima facie case of changed circumstances. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531, fn. 9 [addict must be clean for long period of time to show real reform]; *In re Casey D.* (1999) 70 Cal.App.4th 38, 47 ["merely changing circumstances" insufficient].)

More importantly, Mother failed to specifically describe how the proposed modification would advance S.S.'s best interests. (*G.B.*, *supra*, 227 Cal.App.4th at p. 1157.) While participation in the kinds of classes taken by Mother is to be applauded, it did not establish a prima facie showing that the requested modification or a hearing would be in S.S.'s best interests. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 463.) As for Mother's reliance on a "biological bond" between her and S.S., case law recognizes that "[t]he presumption favoring natural parents by itself does not satisfy the best interests prong of section 388. The cases that state a child may be better off with his or her biological parent rather than with strangers do so when the biological parent has shown a sustained commitment to the child and parenting responsibilities." (*In re Justice P.* (2004) 123 Cal.App.4th 181, 192.) Given the showing made by Mother, the juvenile court did not abuse its discretion in determining that the best interests prong of section 388 was not satisfied.

Mother argues the juvenile court's denial of visitation rights prevented her from strengthening her bond with S.S. She also cites the geographic distance of S.S.'s

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[6] Furthermore, because the May 7, 2018 letter was the same one that Mother submitted at the disposition hearing, it also did not constitute new evidence or show changed circumstances after the disposition.

placement and lack of transportation as the reasons for her failure to visit S.S. more frequently prior to disposition. These arguments are unavailing. After the disposition order (which Mother never appealed), S.S.'s interest in stability became the foremost concern, outweighing any interest Mother had in reunification. (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 251–252.) As the Agency demonstrated in its disposition report, S.S. was placed with caring and attentive relatives who have provided her with a stable and loving home and wish to adopt her. In contrast, Mother spent only brief amounts of time with S.S. after delivery and during one short visit in March 2018, and, after an unsuccessful reunification with her older child, has only just begun to turn her life around. Under these circumstances, the juvenile court could reasonably conclude that disrupting the stable and loving environment in which S.S. has spent most of her life was not in her best interests.

Mother argues the juvenile court's denial of her section 388 petitions without a hearing violated her due process rights. We disagree. As the court recognized in *In re Heather P.* (1989) 209 Cal.App.3d 886, section 388 and California Rules of Court, former rules 1391(c) and 1393 adequately protect a parent's due process rights because they require the juvenile court to liberally construe the petition in favor of its sufficiency and to order a hearing if the petition presents "any evidence" that a hearing would promote the best interests of the child. (*In re Heather P.*, at p. 891.) These requirements[7] constitute "safeguards to prevent arbitrariness in precluding such hearings." (*In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1413–1414.)

Finally, we find no abuse of discretion in the court's denial of the request for a continuance. "Continuances shall be granted only upon a showing of good cause and only for that period of time shown to be necessary by the evidence presented at the hearing on the motion for the continuance." (§ 352, subd. (a)(2).) A noticed motion is ordinarily required, but the court may consider an oral motion upon a showing of good cause. (*Id.*, subd. (a)(3).) Mother did not show the requisite good cause. She provided

[7] Section 388's requirement of liberal construction of petitions for modification is now set forth in California Rules of Court, rule 5.570(a).

no details or explanation of her unspecified medical condition or of the financial issues preventing her from obtaining documentation from her storage shed. Furthermore, because the record is devoid as to what additional testimony or evidence Mother would have provided had the matter been continued, Mother fails to demonstrate a reasonable probability that any further evidence or testimony would have changed the ultimate result. Thus, any claimed error was harmless. (*In re Celine R.* (2003) 31 Cal.4th 45, 60 [applying harmless error test in dependency matters].)

DISPOSITION

The orders denying Mother's section 388 petitions and continuance request are affirmed.

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Fujisaki, J.

WE CONCUR:

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Siggins, P. J.

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Petrou, J.

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